No. 86-2029

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLARKE DUNLAP
PETITIONER

v.

UNIVERSITY OF KENTUCKY
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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DATE: JUNE 16, 1987

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QUESTION PRESENTED

I. Whether this Court should modify its decision in *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234 (1985) in light of the congressional response to that decision, Public Law 99-506, Section 1003, and allow a disabled citizen who had a case pending at the time of *Atascadero,* to proceed with his suit against the Respondent, University of Kentucky in Federal Court for compensatory relief based on violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794.

In the Supreme Court of the United States

OCTOBER TERM, 1986

86-_____

CLARKE DUNLAP
PETITIONER

v.

UNIVERSITY OF KENTUCKY
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Clarke Dunlap, Petitioner and Appellant below, hereby petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the Judgement in *Clarke Dunlap* v. *University of Kentucky* (6th Cir. No. 86-5685; March 18, 1987; Unpublished Opinion).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not published but is reprinted at page 1a of the Appendix (hereinafter "App.") to this Petition. Two unreported Orders of the District Court (involving dismissal of Petitioner's compensatory

claim and an Agreed Order between the parties dismissing the equitable portions of his claim so that a final and appealable Order could be entered) are reprinted at App. 2a-3a and 4a-10a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on March 18, 1987. Petitioner elected not to file a Motion for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 794, and in effect at the time the action herein commenced provided:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an Executive Agency or by the United States Postal Service.

42 U.S.C. Sec. 2000d-7, provides:

(a) General Provision —

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for violation of section 794 of title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, [42 U.S.C. Sec. 6101 et seq.] title VI of the Civil Rights Act of 1964 [42 U.S.C. Sec. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a state.

(b) Effective Date —

(1) The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

STATEMENT OF THE CASE

A. The Facts

Petitioner Clarke Dunlap enrolled in a Ph.D. geography program at the Respondent University of Kentucky in the fall of 1979. On December 18, 1979, Mr. Dunlap, after receiving an influenza inoculation at the University of Kentucky Medical Center, was stricken by a severe quadripetic—paralytic neurological disorder and became handicapped. He was hospitalized from December 18, 1979 until August 23, 1980. He remains confined to a wheelchair for most of each day. Upon release from the hospital, Petitioner enrolled for the 1980 fall semester at the University of Kentucky, carrying a full doctoral program academic load.

On February 27, 1981, Mr. Dunlap received a letter from the Director of Graduate Studies at the University of Kentucky informing him that his grades in the Ph.D. program were "substandard". Mr. Dunlap's grades were at no time below a 3.00 grade point average (out of 4.00) and he was at all times performing adequately. However, in light of such letter, the lack of support services, and the treatment he received from the University of Kentucky, Mr. Dunlap resigned in March, 1981 from the graduate program. Shortly thereafter, Mr. Dunlap reconsidered and applied for readmission on March 31, 1981. The University of Kentucky refused

Mr. Dunlap readmittance citing his marginal performance. Mr. Dunlap also applied for readmission in 1982 to the Respondent's graduate program but was again denied. These denials and other discriminatory treatment led Mr. Dunlap to seek a redress of his grievances in Federal court.

B. Proceedings in the District Court and the Court of Appeals

Mr. Dunlap filed a pro se Complaint on February 22, 1982 in the United States District Court for the Eastern District of Kentucky seeking both compensatory and injunctive relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794. He alleged that the University of Kentucky wrongfully discriminated against him because of his handicap, in forcing him to resign and in refusing him readmittance to the graduate geography program. Mr. Dunlap proceeded without counsel for the next ten months until he retained legal counsel on December 30, 1982. The matter then proceeded in litigation until February 13, 1986 when the District Court dismissed that portion of Mr. Dunlap's claim for compensatory damages based upon this Court's holding in *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234 (1985) but allowed Mr. Dunlap to proceed with his claim for equitable relief. (App. 4a). However, by that time, Mr. Dunlap had enrolled at Louisiana State University in Baton Rouge, Louisiana

and was well on his way to completing his doctoral degree. He, therefore, on May 23, 1986, voluntarily agreed to dismiss the equitable portions of his claim against the Respondent and preserved the right to appeal for compensatory relief. (App. 2a).

Petitioner perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit, which entered an Opinion on March 18, 1987 affirming the Order of the District Court. Petitioner elected not to seek a rehearing on this matter considering the nature of the issue to be appealed.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO MODIFY ITS DECISION IN *ATASCADERO STATE HOSPITAL* V. *SCANLON* IN LIGHT OF THE UNIFIED CONGRESSIONAL RESPONSE TO THAT DECISION AND ALLOW A DISABLED CITIZEN WHO HAD A CASE PENDING AT THE TIME *ATASCADERO* WAS RENDERED, TO PROCEED TO THE MERITS OF HIS CLAIM IN FEDERAL COURT FOR COMPENSATORY RELIEF BASED ON VIOLATIONS OF SECTION 504 OF THE REHABILITATION ACT OF 1973.

In a 5 to 4 decision, this Court, in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, (1985), held that the Eleventh Amendment to the United States Constitution bars suits against States and State agencies in Federal court for retroactive monetary relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794. The majority of this Court noted that Congress could override the Eleventh Amendment when it enacted legislation for the purpose of enforcing certain provisions of the Fourteenth Amendment. *Id.* at 238. However, the majority also opined that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. *Id.* at 243. The majority of this Court went on to find that Section 504 did not express the necessary congressional intent to pierce the protective veil afforded States by the Eleventh Amendment. *Id.* at 246.

In contrast, the four-person minority in *Atascadero*, believed that the express language of the

statute itself and its legislative history led to the inescapable conclusion that Congress intended Section 504 to impose an obligation on the States that was enforceable in Federal court. *Id.* at 248, 252. The minority further pointed out that the majority's construction of Section 504, had "put the Federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other actor in our nation." *Id.* at 248.

In direct response to, and only 36 days after the *Atascadero* decision was rendered, legislation was introduced in Congress to overturn the future impact of this decision. 132 Cong. Rec. S 15104 (daily ed. October 3, 1986) Senator Cranston, along with 8 co-sponsors introduced, on August 1, 1985, legislation that would nullify *Atascadero's* prospective application. *Id.* This legislation was eventually incorporated with other legislation designed to assist disabled Americans and became known as the Rehabilitation Act Amendments of 1986. *Id.* at S 15105-15106. All of this legislation was eventually enacted into law as Public Law 99-506, and was signed by President Reagan on October 27, 1986. *U.S. Code Cong. and Admin. News* 1986, p. 3554. This Act passed the House of Representatives 408 to 0 and, also, apparently, passed the Senate without a dissenting vote. *132 Cong. Rec.* H 8943 (daily ed. October 2, 1986) and S 15106 (daily ed. October 3, 1986).

Section 1003 of Public Law 99-506, now codified as 42 U.S.C. 2000d-7, specifically mandates that a State

shall *not* be immune under the Eleventh Amendment from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. (Emphasis added). This statute also provides that compensatory relief may be sought as a remedy for such violations. However, Congress, giving due consideration to constitutional limitations governing legislative retroactivity and its effect on prior decisions of this Court, made this legislation applicable only to those violations which occur in whole, or in part, after October 21, 1986, the effective date of the Act. 42 U.S.C. Sec. 2000d-7(b). See the U.S. Department of Justic letter to Senator Orin Hatch reprinted in its entirety at 132 *Cong. Rec.* S 15105-15106 (daily ed. October 3, 1986).

Unfortunately, for Clarke Dunlap this new statute does not bring his claims against Respondent within the umbrella of its protection. His rights under Section 504 were violated by the Respondent during 1981-82. As a result, Mr. Dunlap's only remaining opportunity to proceed to the merits of his claim is for this Court to modify its holding in *Atascadero*. Petitioner submits there is ample and persuasive authority for this Court to do so.

This Court in *Glidden Company* v. *Zdanok*, 370 U.S. 530 (1962), has previously held that:

> Subsequent legislation which declares the intent of an earlier law, . . . is not, of course, conclusive in determining what the previous Congress meant.

> But the later law is entitled to weight when it comes to the problem of construction." Citing *Federal Housing Administration* v. *Darlington,* 358 U.S. 84 (1958), among others. Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion. As examination of the House and Senate reports makes evident, that is what occurred here. *Id.* at 541-542.

In the case at bar, there can be no dispute that Congress responded almost immediately to the *Atascadero* decision by enacting 42 U.S.C. Sec. 2000d-7. Senator Cranston, the principal sponsor of this statute made numerous statements during the floor discussion of this legislation concerning his reasons for introducing the bill:

> SENATOR CRANSTON: "I am thus delighted by the provisions included in the conference report, which I authored, to overturn the recent Supreme Court decision in the case of *Atascadero Hospital* v. *Scanlon* which substantially damaged the scope of protections provided to persons with disabilities under Section 504. . . . . In response to the Supreme Court's decision in the *Atascadero* case, on August 1, 1985, I introduced the proposed Civil Rights Remedies Equalization Act, legislation to nullify that ruling. This legislation is necessary for the purpose of implementing Section 504 because of the Supreme Court ruling in the *Atascadero* case that, even though the statute authorizes an

> aggrieved party to bring suit in Federal Court against a category of entities that literally includes the States, the States may not be sued in Federal Court unless the law expressly make the States answerable in Federal Court." 132 *Cong. Rec.* S 15104 (daily ed. October 3, 1986) (statement of Senator Cranston).

Senator Cranston went on to discuss some of the background behind Section 504 of the Rehabilitation Act of 1973 of which he was also the principal author. *Id.* at S 15104. Senator Cranston explained that he joined with two other senators and five congressmen in submitting an Amicus Brief in the *Atascadero* case urging this Court not to reach the decision that it did. *Id.* Finally, in some of his concluding remarks during the floor discussion of this legislation Senator Cranston stated:

> "In this way, the legislation would eliminate the Court—made barrier to effectuating congressional intent that the holding in the *Atascadero* case so unwisely has raised." *Id.* at 15105.

Senator Cranston's remarks are significant because this Court has previously ruled that it is the legislative sponsor which it looks to when the meaning of statutory words are in doubt. *N.L.R.B.* v. *Fruit & Veg. Pack. & Whse. Loc. 760*, 377 U.S. 58 (1964).

Senator Cranston was not alone, however, in voicing congressional opposition to the *Atascadero* decision. The Senate Committee on Labor and Human Resources in its report on the Rehabilitation Act Amendments of 1986 discussed the deleterious and unintended effects of *Atascadero* and concluded:

> The Supreme Court's decision misinterpreted congressional intent. Such a gap in Section 504 was never intended. It would be inequitable for Section 504 to mandate State compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue. *Report of the Senate Committee on Labor & Human Resources* S. Rep. No. 99-388 p. 27 - 28 (1986).

Thus, there is compelling evidence to prove that Congress strongly believed that the Court misinterpreted its intent and the express language in the statute when *Atascadero* was decided.

It was slightly less than four years ago that this Court in *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 676 (1983) reacted to a similar legislative initiative by modifying one of its prior decisions. In *EEOC*, this Court went beyond the statutory language to determine whether Congress by enacting the Pregnancy Discrmination Act, not only overturned the specific holding in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) but also rejected the test of dis-

crimination employed by the Court in that case. *Id.* at 676. After re-evaluating the legislative history of the Act involved and giving due deference to the arguments previously raised by the dissenters in *Gilbert*, this Court revised its earlier holding.

The instant case then, is not like the situation that frequently occurs when Congress does not respond to a one of this Court's decisions involving statutory construction. For example, in *Canada Packers, Ltd.* v. *Atchison T.&S. F.RY. Co.*, 385 U.S. 182 (1966) this Court was asked to modify one of its earlier decisions which construed a provision of the Interstate Commerce Act. In *Canada*, this court refused to disturb the prior construction it had given the statute and observed:

> It is not shown, however, that the long standing construction of this statute by both the Commission and this Court, has produced any particularly unfortunate consequences and Congress, which could easily change the rule, has not yet seen fit to intervene. In these circumstances, we shall not disturb the construction previously given the statute by this Court, and the decision of the Court of Appeals must be reversed. *Id.* at 184.

Here, we not only have a "particularly unfortunate consequence", (Petitioner cannot open the door to the Federal courthouse to proceed with his lawsuit), but we also have an immediate and unequivocal congres-

sional response to the construction which this Court placed on Section 504.

In summary, all that Clarke Dunlap seeks is the opportunity to pursue his discrimination claim. He had such an opportunity until June 28, 1985 when the *Atascadero* decision was rendered. He can not take advantage of the opportunity Congress provided in October, 1986 when it enacted Public Law 99-506, Sec. 1003. He now petitions this Court for that "window of opportunity" to have his claim heard on the merits.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(Counsel of Record)

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DATE: June 16, 1987

APPENDIX

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FILED
MAR 18 1987
JOHN P. HEHMAN, Clerk

No. 86-5685
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARKE DUNLAP, Plaintiff-Appellant.

vs.

UNIVERSITY OF KENTUCKY, Defendant-Appellee.

ORDER

Before: ENGEL, KRUPANSKY AND GUY, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ Leonard Green
Leonard Green, Chief Deputy

* * * * * * *

FILED
MAY 23 1986
AT COVINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

CIVIL ACTION NO. 82-24

CLARKE DUNLAP PLAINTIFF

VS. **AGREED ORDER**

UNIVERSITY OF KENTUCKY DEFENDANT

The Court having rendered an Opinion and Order dated February 13, 1986 holding that compensatory damages may not be had herein as to the University of Kentucky because of the bar of the Eleventh Amendment and denying Plaintiff's motion for a jury trial, and counsel for Plaintiff having avered to the Court during a Pre-Trial Conference of April 4, 1986 that Plaintiff is currently enrolled at Louisiana State University and thus does not desire relief herein in the form of equitable relief or reinstatement to the University of Kentucky, and counsel for Plaintiff having further avered to the Court that Plaintiff desires a voluntary dismissal of his remaining claims herein so that a final and appealable order may be entered and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED:

1. That the remaining claims in Plaintiff's Complaint and Amended Complaint are hereby dismissed with prejudice at the request of Plaintiff, with the agreement of the Defendant.

2. That a Final Judgment be entered herein in conformity with this Order.

This 23rd day of May, 1986.

/s/ William O. Bertelsman
William O. Bertelsman, Judge

AGREED:

Anggelis & Philpot
By /s/ Tim Philpot
Attorney for Plaintiff

/s/ John C. Darsie
Attorney for Defendant

* * * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

CONSOLIDATED
CIVIL ACTION NOS. 82-24 & 82-104

CLARKE DUNLAP PLAINTIFF

VS. **OPINION AND ORDER**

UNIVERSITY OF KENTUCKY DEFENDANT

This matter is before the court on defendant's motion to dismiss and/or for summary judgment, and plaintiff's demand for a jury trial.

The case is based on alleged violation of 29 U.S.C. §794, §504 of the Rehabilitation Act of 1973, and on 42 U.S.C. §1983, alleging violations of the First Amendment and the Fourteenth Amendment due process and equal protection provisions.

DEFENDANT'S MOTION TO DISMISS

The first question is the applicability of the Eleventh Amendment to the defendant University of Kentucky and state officials. It is clear that the Univer-

sity of Kentucky is a state agency. *See* KRS 164.100; *Depperman* v. *University of Kentucky,* 371 F.Supp. 73 (E.D. Ky. 1974); *Martin* v. *University of Louisville,* 541 F.2d 1171 (6th Cir. 1976); and the analysis under *Hall* v. *Medical College of Ohio at Toledo,* 742 F.2d 299 (6th Cir. 1984). Plaintiff acknowledges that the Eleventh Amendment bars compensatory damages against a state entity, even under 29 U.S.C. §794, due to the recent case of *Atascadero State Hospital* v. *Scanlon,* _____ U.S. _____ (June 28, 1985).

The University of Kentucky argues that *Atascadero, supra,* and *Pennhurst State School & Hospital* v. *Halderman,* 465 U.S. 89 (1984) (Pennhurst II), bar equitable relief against it. But neither case supports that assertion. *Atascadero* questioned whether 29 U.S.C. §794 allowed retroactive monetary damages. *Pennhurst II* concerned federal courts ordering state officials to conform their action to state law. The Eleventh Amendment prohibited both actions. But the right to equitable prospective relief remains viable under *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Therefore, plaintiff can claim injunctive and declaratory relief against the University of Kentucky and the state officials.

Plaintiff claims that he can recover compensatory damages against the University of Kentucky for constitutional violations via 42 U.S.C. §1983. But the Eleventh Amendment prohibits compensatory damages unless the state has specifically waived immunity

to suit in federal court. Kentucky has not done so. Also, Congress did not abrogate state immunity in the enactment of 42 U.S.C. §1983. *Edelman* v. *Jordan,* 415 U.S. 651 (1974); *Quern* v. *Jordan,* 440 U.S. 332 (1979); Therefore, compensatory damages against the state are not available under either 42 U.S.C. §1983 or 29 U.S.C. §794.

Defendant University of Kentucky further argues as a part of its immunity defense that it is not a "person" under 42 U.S.C. §1983. This is just another way of invoking the same result under the Eleventh Amendment. *See Quern* v. *Jordan,* 4410 U.S. 332 (1979) (sic) and Cook & Sobieski, *Civil Rights Actions* §7.08 n.3. Under similar analysis, no compensatory damages can be awarded.

Next, defendant University of Kentucky argues that any claim based on 29 U.S.C. §794 must be dismissed because the statute applies only to programs receiving federal financial aid. Under *Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624 (1984), and *Grove City College* v. *Bell,* 465 U.S. 555 (1984), a "program" is limited to the relevant division or department within the organization. The University of Kentucky argues that the Department of Geography received no federal funds in the time period plaintiff was enrolled.

While University of Kentucky's interpretation of the law appears correct, it would be premature to dismiss the University of Kentucky on that premise at

this time. There is yet any evidence to determine if the Graduate Studies program was involved and their receipt, if any, of federal funds. Also, there may be a legal question of whether this court should restrict its review of the federal funds received to the two or three year period plaintiff was enrolled even though the Department of Geography may have received substantial funds in preceding or subsequent years. Finally, the Department of Geography may have received federal property or services that amount to federal financial assistance.

Finally, the University of Kentucky argues that there is no state action because it, in fact, has a regulation that prohibits giving grades to students on any basis other than established standards. This argument misses the point. While there is an issue of dispute as to plaintiff's grades, the regulation University of Kentucky quotes has nothing to do with whether state officials discriminatorily denied plaintiff readmission or counseling. Plaintiff should be given the opportunity to prove state action.

In sum, the University of Kentucky's motion to dismiss is granted in part as to any recovery of compensatory damages due to the Eleventh Amendment, and denied in part as to recovery based on equitable relief.

Discovery should proceed on the issues of plaintiff proving that he was an "otherwise qualified" applicant and that he was denied readmission or counseling

because he was handicapped. Plaintiff has a very heavy burden, as exemplified in the recent case of *Regents of the University of Michigan* v. *Ewing,* _____ U.S. _____ (December 12, 1985) (must be "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment"), slip opinion at p. 12-13.

DEMAND FOR JURY TRIAL

The next question is that plaintiff has made a demand for a jury trial under F.R.Civ.P. 38. Rule 38 requires that the demand be made "not later than 10 days after the service of the last pleading directed to such issue." The last pleadings related to the issues for which jury trial is requested were filed two years and 8 to 9 months ago. Thus, plaintiff's demand for a jury trial is untimely under Rule 38.

Rule 39 allows a court to order a jury trial upon motion. This Rule is entirely within the discretion of the court and the "better" view is that the Rule is liberally applied. *See* Bertelsman & Philipps, *Kentucky Civil Practice,* Vol. 2, Rule 39.02, p. 26. Since plaintiff was pro se until recently, the demand may be proper under Rule 39, even though the motion was made under Rule 38.

However, another concern is whether plaintiff is entitled to a jury trial, even if the demand is timely. Plaintiff's suit is premised on 29 U.S.C. §794 and 42

U.S.C. §1983. 29 U.S.C. §794 incorporates the rights and remedies of Title VI and VII in 42 U.S.C. 2000 d and e. Therefore, there is no right to a jury trial under the Handicap Act, 29 U.S.C. §794. *See Doe* v. *Region 13 Mental Health Comm.*, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983).

As to 42 U.S.C. §1983, there is no right to jury trial for equitable relief but only for compensatory or punitive damages. *Hildebrand* v. *Board Trustees*, 607 F.2d 705 (6th Cir. 1979). Since plaintiff is not entitled to compensatory damages from the University of Kentucky, he is not entitled to a jury trial against the University of Kentucky.

In sum, plaintiff is not entitled to a jury trial under 29 U.S.C. §794 or under 42 U.S.C. §1983, as to the University of Kentucky. Since the plaintiff and defendant University of Kentucky have jointly moved to sever the #82-104 action against the other defendants, the court has not addressed the immunity or jury trial issue as to those defendants.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the motion of defendant University of Kentucky to dismiss is granted, in part, as to any recovery of compensatory damages, due to the Eleventh Amendment, and denied, in part, as to recovery based on equitable relief; and

2. That the motion of plaintiff for a jury trial be, and it is, hereby denied.

This 13th day of February, 1986.

/s/ William O. Bertelsman
William O. Bertelsman, Judge

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON 2-13-86
LESLIE G. WHITMER, CLERK
BY: /s/ Nancy C. Anderson D.C.

* * * * * * *